Article Discusing the Topics of

The Unauthorized Practice of Law and The Problem of Multiple Client Loyalties

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I. Introduction

There have been several decisions handed down from the Arkansas Supreme Court in recent years which, along with the Arkansas laws and Real Estate Commission Regulations, every real estate professional in the State of Arkansas should become familiar. Thus, the purpose of this article is to briefly discuss these Supreme Court decisions.

The first two decisions which will be discussed deal with the subject of the real estate professional and the unauthorized practice of law. The third decision was handed down by the Supreme Court on June 30, 1986, and relates to the much publicized concern relating to the practical and legal problems which can confront the real estate professional when faced with multiple loyalties to the buyer and seller in the average real estate transaction.

II. The Unauthorized Practice of Law

The subject matter which has been captioned "the unauthorized practice of law" deals primarily with the question of when do real estate agents and/or brokers improperly invade the province of lawyers, thus subjecting themselves to being sued for the unlicensed, and thus unauthorized, practice of law? This question is of extreme importance to every real estate professional for two primary reasons.

First, the unauthorized practice of law can subject the agent or broker to lawsuits seeking to enjoin the unlawful conduct. Second, and to this author the most important reason, is that by engaging in the unauthorized practice of law, the agent or broker is no longer judged by the standard of care normally attributable to a member of the real estate profession, but instead is held to the same standard of care as a licensed Arkansas attorney. This is particularly important not only because it may lead to liability being assessed against the agent or broker by a court of law, but also because many errors and omissions policies specifically exempt from coverage those liabilities which are assessed against the insured for engaging in areas of expertise for which they are not licensed, i.e. law, appraisal, accounting, etc. The balance of this section will discuss the decisions of the Arkansas Supreme Court which provide guidance as to exactly what constitutes the unauthorized practice of law by real estate agents and brokers in Arkansas.

The determination of what real estate agents and brokers could do to finalize real estate negotiations and transactions received a very cold shoulder from the Arkansas Supreme Court the first time that question came before it. In Arkansas Bar Association v. Block, 230 Ark. 430, 323 S.W.2d912(1959), before it reached the question of whether the acts which were challenged in that case actually constituted the practice of law, the Court recognized the vague distinction between whether or not a challenged practice was or was not the unauthorized practice of law and opted for a standard of "we'll know it when we see it." The Court stated that:

> Research of authorities by able counsel and by this Court has failed to turn up any clearly comprehensible definition of what really constitutes the practice of law. Courts are not in agreement. We believe it is impossible to frame any comprehensive definition of what constitutes the practice of law. 323 S.W.2d at 914.

In Block, the Court went on to hold that real estate professionals in Arkansas were absolutely prohibited

from completing any forms normally incident to a real estate transaction, except for offers and acceptances.

The questions raised in Block were again addressed by the Arkansas Supreme Court in Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963), wherein the Court modified its holding in Block, and stated that:

> ...a real estate broker, when the person for whom he is acting has declined to employ a lawyer to prepare the necessary instruments and has authorized the real estate broker to do so, may be permitted to fill in the blanks in simple printed standardized real estate forms, which forms must be approved by a lawyer; it being understood that these forms shall not be used for other than simple real estate transactions which arise in the usual course of the broker's business and that such forms shall be used only in connection with real estate transactions actually handled by such brokers as a broker and then without charge for the simple service of filling in the blanks. 367 S.W.2d at 423.

The Court's decision in Creekmore was recently reaffirmed in the decision of Pope County Bar Association, Inc. v. Suggs, 274 Ark. 250, 624 S.W.2d 828 (1981). In the Pope County decision, the Court's opinion makes it clear that there are some absolute "do's" and "don'ts" for real estate agents and brokers. First, the real estate agent or broker should never charge a fee for preparing the documents incident to the closing of a real estate transaction. Second, the real estate agent or broker should never prepare documents and close transactions unless the actual marketing of the property in question was done by the broker, either solely, or in cooperation with another broker (a "co-op" sale). Third, the broker must be sure that each form used in a transaction has been approved by a licensed Arkansas attorney. Fourth, the broker must never give advice or opinions as to the legal rights of the parties, as to the legal effects of instruments, or as to the validity of title to real estate. Fifth, the pre-approved forms must be used only in connection with "simple real estate transactions which arise in the usual course of the broker's business."

The Supreme Court defines a "simple real estate transaction" as:

> ...those which involve a direct, present conveyance of a fee simple absolute between parties, which becomes effective immediately upon delivery of the title document. Such transactions do not include conveyances involving reservations or provisions creating life estates, limited or conditional estates, contingent or vested remainders, fee tails, easements or right-of-way grants, or any other conveyance of future, contingent or limited interest.

One example of a common transaction which does not technically meet the Supreme Court's definition of a "simple real estate transaction" is a purchase contract (also known in various parts of the state as an installment sales contract, a conditional sales contract, a land contract, or a contract for deed). In most purchase contracts, there is not a "...present conveyance of a fee simple absolute," thus making it questionable as to whether a real estate broker can handle this type of transaction. However, because this is certainly a common transaction in most parts of the state -- particularly away from the urban areas, it is unclear if the Court meant to prohibit brokers from handling this type of transaction. However, because of the uncertainty, it would be advisable to involve an attorney when handling this type of transaction, or to at least have an attorney approve the real estate broker's methodology in handling this type of transaction.

If other transactions cannot, in their entirety, meet the definition of a "simple real estate transaction" set forth above, then an attorney must be consulted. Furthermore, if only one phase of a transaction is unusual, for example an unusual clause within an Offer and Acceptance, then an attorney must approve the use of the clause. Of course, this approval should be documented by a letter from the approving attorney.

At this point, it should be made clear that the Supreme Court did not find that the authorized transactions set forth above were not the practice of law. Instead, the Court specifically stated that these functions do constitute the practice of law, albeit the authorized practice of law. This is important, as was pointed out by Justice Hickman in the Pope County decision:

> ...realtors should be aware that their negligence in preparing such legal documents may well be

> examined by applying a standard of care expected of attorneys. They sought and gained the right to practice law. With that convenience goes a heavy responsibility to the public. 624 S.W.2d at 831.

With regard to Justice Hickman's comment, this author encourages every real estate broker and agent to look upon the Judge's "warning" not as something to fear, but as an incentive to strive each and every day for the professionalism which the Supreme Court entrusted to the real estate profession.

III. The Problem of Multiple Client Loyalties

For the first time, the Arkansas Supreme Court was called on in 1986 to decide the problem which has been characterized in numerous real estate related publications as the "dual agency" problem. The problem was aptly summarized by the Court in the recent decision of Fennell v. Ross, 289 Ark. 374 (June 30, 1986):

> In many real estate transactions, there are two brokers involved. One of the brokers is the "listing broker" and the other broker is the "selling broker." When this is the case, the agency relationship is usually established between the seller and the listing agent through the listing contract, an agreement that acts as an employment contract for the listing agent. An agency relationship between the seller and the selling broker is often created by express language in the listing agreement. The clause that creates this agency relationship expressly authorizes or requires the listing agent to utilize the services of other brokers as subagents. Therefore, any broker who is not the listing broker but is attempting to effect a sale of the property in cooperation with the listing agent is considered a subagent. Consequently, when the listing contract contains such a provision, the selling broker has the duties of agency imposed upon him as a subagent of the listing broker. In essence, the selling broker, as subagent, is the agent of the seller. This subagency relationship with the seller, which generally precludes an agency relationship with the buyer, seems to be ignored by, if not unknown to, many selling agents. In addition, most buyers are probably unaware of its existence much less its legal ramifications. In practice, if the selling broker ever meets the seller, it is usually either when showing the property to a prospective purchaser or upon presentation of a purchase offer to the seller. However, the selling broker's relationship with the buyer is quite different. Often, the broker has been in the company of the purchaser for many hours and has conducted some fairly confidential interviews with the prospective purchaser. Given such extensive contact with the buyer, and such minimal contact with the seller, the buyer is justified in believing that the agent will do his best to obtain the property for the buyer at the lowest possible price and on the most advantageous terms. Of course, for the agent to attempt to do so is a violation of the agent's duty to the seller. However, it would be unrealistic to expect the buyer to feel that a broker who has worked with him extensively is attempting to obtain the highest possible price for the seller, which, in actuality, is the agent's duty. [Footnotes omitted].
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> 289 Ark. at 378-79 (citing Romero, Theories of Real Estate Broker Liability; Arizona's Emerging Malpractice Doctrine, 20 Ariz. L. Rev. 767 at 771-773 (1978).)

After this lengthy discussion of the problem, the Arkansas Supreme Court specifically held that, in the ordinary residential real estate transaction, both the listing and the selling agent, regardless of whether the two are with the same real estate firm, are agents of the Seller, and thus owe to the Seller an undivided fiduciary loyalty. Therefore, real estate professionals should be extremely careful, in situations where they represent the buyer in a "co-op" sale, to avoid the appearance of being the agent for the buyer, but instead should make it absolutely clear during all phases of every transaction that the real estate agent or broker is the agent for the Seller.

Regulation 8.5(a) of the Arkansas Real Estate Commission Regulations is completely compatible with the decision of the Arkansas Supreme Court in Fennell. This regulation provides that:

> 8.5(a). In accepting employment as an agent, a licensee pledges to protect and promote the interests of the client or clients. This obligation of absolute fidelity to the interest of the client or clients is primary, but does not relieve a licensee from the equally binding obligation of dealing honestly with all parties to the transaction.

Following the decision in Fennell, the word "client" which is contained within Regulation 8.5(a) now specifically means the Seller. Therefore, if an agent or broker desires to represent someone other than the Seller, he or she must disclose this fact, in writing, to all parties involved, and receive the acknowledgment of the Seller. (See Regulation 10.10(a), which requires licensees to see that all commitments pertaining to clients are in writing.)

IV. Summary

It is the intent of this article to supply the members of the real estate profession with a synopsis of significant case law from the Arkansas Supreme Court. This is important, because, unlike the Real Estate Laws and Commission Regulations, this case law is not readily accessible to the average real estate professional. **Top of Page**

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